Editor's note: 81 I.D. 44

UNITED STATES

v.

DORA M. WERRY AND HENRY HIRSCHMAN

IBLA 73-214 Decided January 28, 1974

Appeal from decision of Administrative Law Judge Dent D. Dalby, canceling millsite entries (I-4035, I-4036, I-4037).

Affirmed as modified.

Mining Claims: Millsites

A vague intention to use or occupy land embraced in a millsite claim for mining or milling purposes at some time in the future is not sufficient to comply with the requirements for obtaining a millsite.

Mining Claims: Millsites--Withdrawals and
Reservations: Generally

The United States can at any time withdraw its consent to occupancy of public land under the mining laws by withdrawal of the land and if the claimant cannot show that the millsite is being occupied or used for mining or milling purposes as of the date of withdrawal, the claim is properly declared invalid.

Mining Claims: Millsites

The fact that a millsite claimant is the owner of a patented or patentable mining claim does not automatically entitle him to a millsite.

Mining Claims: Millsites--Mining Claims:
Determination of Validity

Where the Government brings charges against a millsite claim alleging that no present use or occupation of the claim for mining

> purposes is being made, and a prima facie case is established in support of the charge, the burden shifts to the claimant to show compliance with the provisions of the statute.

APPEARANCES: Douglas D. Kramer, Esq., Kramer, Plankey, Smith and Beeks, Twin Falls, Idaho, for appellants; Erol Benson, Esq., Office of the General Counsel, Department of Agriculture, for the appellee.

OPINION BY MR. STUEBING

Dora M. Werry and Henry Hirschman have appealed from the decision of the Administrative Law Judge dated November 27, 1972, canceling their millsite entries because they were not used or occupied for mining or milling purposes as required under the Act of May 10, 1872, 30 U.S.C. § 42 (1970), prior to the withdrawal of land from location under the mining laws of the United States.

Notices of location for the three millsites located in the Sawtooth National Forest, Blaine County, Idaho, were filed in 1967. Henry Hirschman filed a notice of location for the Last Chance Millsite and Louis H. Hirschman, his son and predecessor in interest,

filed for the U and I Millsite. Henry Hirschman owns two patented mining claims bearing the same names as the millsites. Dora Werry's predecessor in interest filed for the Curliss Millsite. Dora Werry holds the patent to the Curliss lode mining claim. The land on which all the millsites are located was withdrawn on January 28, 1970. 38 F.R. 1120 (Jan. 28, 1970); 43 CFR 2351.3.

The Bureau of Land Management, upon recommendation of the United States Forest Service, filed a contest against each millsite claim on March 18, 1971, charging that:

> 1. The millsite is not needed, used, or occupied by the proprietor of a vein, lode, or placer claim for mining, milling, processing, or beneficiation purposes, or other operations in connection with such claims.
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> 2. The millsite has no quartz reduction mill or reduction works thereon.
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> 3. The millsite is not being held in good faith for bona fide mining, milling, beneficiation or related purposes.

A hearing was held on July 18, 1972. Mr. Kramer, attorney for the appellants, moved to dismiss the Government's case on the grounds that it had not proved the case by a preponderance of the evidence, according to the allegations of its complaint. The Administrative Law Judge denied the motion as to charges 1 and 2, but granted the motion as to charge 3. (Tr. 105-106.)

John C. Combs, a forester, Recreation and Lands Branch Chief for the Forest Service, testified that he has been on the millsites in question at least 15 times and he has not seen any activity which would indicate that the sites are being used for mining or milling purposes. The only improvements which he noticed were a road (Warm Springs Road) which crosses a part of at least one or two of the claims and a small, undeveloped campsite. There is a small road which leads from Warm Springs Road to the camping area. Combs said that the Forest Service had recommended that the area which included the claims be withdrawn for recreational purposes. Gilbert Farr, employed by the Forest Service as the District Ranger of the Ketchum Ranger District, has been on the claims, and testified that he had not observed any activity by the appellants on the millsites. He saw the Forest Service development road and jeep trail but did not notice any structures on the property. Vernon T. Dow, a mining engineer for the Forest Service, noticed the road and the unoccupied campsite. He verified the fact that there were no bunk houses or other structures on the millsites.

As for the mining claims, Combs and Dow visited the Last Chance and U and I. Combs saw some old dumps and prospect diggings on the claims but stated that from appearance it had been several years since any mining activity had taken place. Dow stated that all the adits except one were caved in. He took some samples of dump material from both claims.

Both Farr and Dow visited the Curliss lode claim. Farr found evidence of a shaft but no evidence of recent mining activities. Farr did not investigate the mineral capacity of the Curliss lode claim. Dow found the discovery shaft, which was caved. He also discovered a whim (manpowered hoist) at the top of the incline shaft. Dow took a sample from across the width of the vein. Dow estimated that it had been 50 to 60 years since these mines were operated.

According to Dow, the nearest mill to the claims is located at Bassett Gulch, which is four miles east of the Last Chance and the U and I lode claims and one mile south of the Curliss lode.

Ted Werry, son of Dora Werry, testified that they paid $600 to have the sites surveyed but that the surveyor was not recognized by the Government to survey federal lands. Appellants then started proceedings for patents for the millsites and applied to the Government for a second survey, paying $600, but this survey was never made. Appellants claim that they need these millsites for processing and storing ore. They chose these particular sites because the road to Bassett Gulch which is above these sites is generally inaccessible in the winter due to snow slides.

They testified that they hesitated making improvements on the property because the Forest Service discouraged them from cutting

trees to clear a road. They claimed that the Forest Service said they would be liable if anyone were injured on the property. They offered testimony to the effect that Dora Werry could afford to purchase the mill at Bassett Gulch and place it on the property but they were leery of doing this because the Government had not permitted use of a bulldozer for clearing.

There was testimony to show that Blaine County is heavily mineralized and has historically had a great deal of mining activity. As for the specific lode claims, Clifford Noxon, mine mechanic and miner, accompanied Ted Werry to the Last Chance and the U and I lode claims and helped him take samples. An assay report of these samples was admitted into evidence. Louis Hirschman testified that he and Mr. Reemsnyder, who mines in the area, took samples from the U and I and Last Chance lode claims. The assay reports from these samples were admitted into evidence. Samples taken from all three claims were assayed upon the Government's request and those reports also were admitted into evidence.

The Administrative Law Judge found that the millsite claims were not being used or occupied for mining or milling purposes as required by statute, and he therefore canceled the claims. In reaching this decision he found that the evidence did not establish that any of the lode claims had economically minable quantities

of ore. He also noted that appellants had made no effort to purchase the mill at Bassett Gulch or even to learn if the mill could be purchased or what price would be asked. Dow testified that he didn't know if the Bassett Mill was for sale, saying, "This is just a presumptive thing." (Tr. 180.) Jones testified that he understood that ownership of the mill was uncertain because the title was in litigation.

We affirm the Judge's holdings, but emphasize that the critical issue involved is whether appellants complied with the law as of January 28, 1970, the date of the withdrawal.

The effect of a withdrawal of public land is to prevent further acquisition of private rights in such land. See United States v. Heirs of John D. Stack, A-28157 (March 28, 1960). A mining claim initiated while the land was subject to the operation of the mining laws is not a valid claim unless there has been a discovery of valuable minerals within the limits of the claim prior to the withdrawal of the land from entry under the mining laws. United States v. Everett, A-27010 (Supp.) (October 17, 1955); United States v. Pulliam, 1 IBLA 143 (1970); United States v. Gunsight Mining Company, 5 IBLA 62 (1972); United States v. Duval, 1 IBLA 103 (1970). If the claim was not supported by a qualifying discovery of a valuable mineral deposit at the time of withdrawal, the land embraced within

its boundaries would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the value of the deposit subsequently increased due to a change in the market value of the mineral. United States v. Henry, 10 IBLA 195 (1973). To validate a mining claim, compliance with the mining laws must precede withdrawal. Since the millsite is a creature of the mining laws, the same principle of law is applicable. The United States can at any time withdraw its consent to occupancy of public land under the mining laws by withdrawal of the land, subject to valid existing rights. The claimant must then be prepared to show that he has satisfied the requirements of the law at that time. United States v. Henry, supra. From the facts ascertained at the hearing, we find that appellants have not shown the necessary compliance to establish the validity of the millsite claims as of the date of withdrawal, January 28, 1970.

The pertinent part of the law for obtaining patent to millsites reads as follows:

> Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such nonadjacent land shall exceed five acres * * *.

30 U.S.C. § 42(a) (1970).

In Alaska Copper Company, 32 L.D. 128, 131 (1903), the Acting Secretary interpreted the requirements of the Act by stating:

> * * * A mill site is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill site at the time patent thereto is applied for to come within the purview of the statute. * * *

In applying this interpretation to our case, we find that appellants fail to meet the mandate of the law. The evidence presented by appellants at the hearing does not show either a present occupation or use of the tract for mining or milling purposes as of January 28, 1970. There were no improvements indicative of occupation or use. Testimony on behalf of the Forest Service showed that there had been no recent mining activities on any of the lode claims, perhaps for as long as 50 or 60 years. The only noticeable activity of any description on the lode claims was the gathering of samples which is not "mining activity" as envisioned by the drafters of the statute. None of the mines were being operated so it is apparent that the millsite claims were not used for mining or milling purposes in connection with the lode claims. United States v. S.M.P.

Mining Company, 67 I.D. 141 (1960); United States v. Skidmore, 10 IBLA 322 (1973).

Appellants allude to plans to use the site for the storage of ore from the lode claims. They indicate that acquisition of the millsite claims is a condition precedent to reopening their mines. They argue that they must have a place to store the ore before commencing mining operations. Storing ore may be considered to be a use of the land for mining purposes. See Charles Lenning, 5 L.D. 190 (1886). However, a vague intention to use the land at some future time does not satisfy the requirements of the statute. United States v. S.M.P. Mining Company, supra; United States v. Herron, A-27414 (March 18, 1957).

We have also considered appellants' rather irresolute and tentative desire to acquire the mill at Bassett Gulch. Even if we assume that such a purchase is feasible, we are still faced with the fact that there was no mill on the property at the date of withdrawal. The prospective acquisition of a mill implies future use of the land and is therefore insufficient where no action has been initiated to devote the land to the purposes contemplated by the law.

When the claimant is not actually using the land, he must show an occupation by improvements, or otherwise, as evidence of intended

use of the tract in good faith for mining or milling purposes. Charles Lenning, supra. The testimony of the Forest Service showed no evidence of improvements which would indicate occupation and use. Appellants offered no evidence of improvements, but claim that they were hampered in their progress to clear and improve the property by the remarks of Forest Service personnel. Having studied the testimony, we do not find that the Forest Service employees said anything that would prevent appellants from using the land within the confines of the statute. The Act of July 23, 1955, 30 U.S.C. § 612 (1970) permits a claimant of any claim located under the mining laws to sever, remove or use any surface resource subject to management or disposition by the United States, to the extent required for such claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures, or to provide clearance for such operations. See also Solicitor's Opinion, 64 I.D. 301 (1957).

Appellants maintain in their statement of reasons that the Administrative Law Judge's decision is contrary to the law and evidence in the case and that his findings of fact are not supported by the evidence. The preceding analysis of the facts and the application of the law to these facts show that this contention is without merit.

Appellants assert that the Administrative Law Judge arbitrarily refused to admit into evidence actual samples from the lode claims. Although he did not admit the samples, he considered all the testimony and assay reports relating to the samples in rendering his decision. He noted that the samples themselves did show significant mineral values but found that there was no showing to establish that there are economically minable quantities of ore on any of the lode claims.

We generally agree with the Judge's findings. We stress, however, that the mineralization or potential productivity of nearby mining claims, patented or unpatented, cannot be relied upon in 1972 to show the validity of millsite claims located on land which was withdrawn early in 1970. That is to say that evidence of a mine's potential for future commercial development cannot be applied with retrospective effect to establish the past validity of an associated millsite claim, where the imposition of a withdrawal requires that the validity of the mill site be tested as of the time of the withdrawal.

Appellants argue that the Government should carry the burden of proof in the proceeding since it initiated the contest. They claim that the fact that they must carry the burden is contrary to the procedure in the courts and constitutes bureaucratic abuse. In United

States v. S.M.P. Mining Company, supra, at 144, the Deputy Solicitor discussed this point:

> The appellant, as the party seeking a gratuity from the Government, must assume the burden of showing that it has complied with the terms of applicable mining laws, and where, as here, the appellant's compliance with the applicable law is challenged by the Government and a prima facie showing is made that the claim is invalid, the burden then shifts to the appellant to show that the claim is valid. Foster v. Seaton, 271 F.2d 836 (1959).

We find this responsive to appellants' contention.

Appellants seek to distinguish between cases in which the Government contests a claim which is not the subject of a patent application and cases in which application for patent has been filed. They admit that the law requires use of the millsite for mining or milling purposes before the claim can be patented, but assert that their patent application was not accepted. This distinction is not valid. A claimant must be prepared to show that a millsite meets the requirements of the law at the time the claim is contested or the land embracing the claim is withdrawn, whichever occurs first. United States v. Murer, 4 IBLA 242 (1972).

We also disagree with appellants' interpretation of the last sentence of 30 U.S.C. 42 (1970) which reads as follows: "The owner

of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section." Appellants assert this means that the owner of a mine is entitled to a millsite and does not have to own a quartz mill or reduction works. Simple analysis of the language of the statute disproves this contention. Moreover, the issue of whether the owner of a patented mining claim is automatically entitled to a mill site claim has been decided. In United States v. Wedertz, 71 I.D. 368, 373 (1964), the Acting Solicitor discussed this point, stating:

> * * * The fact that the claims here have been patented is not a critical distinction since all the indications are that at the time when Wedertz acquired the claims there was no longer any valid discovery exposed on the claims. 1/ Of course, since the claims have been patented, this would have no bearing on the title to the land. The point is, however, that, merely because a mineral patent has been issued for a tract of land, all operations undertaken thereon at a later time are not necessarily mining operations so far as the mill site law is concerned.
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> 1/ See United States v. Alvis F. Denison et al., 71 I.D. 144 (1964), and the cases there cited, for the various circumstances under which a valid discovery may be lost with the passage of time.

We find this conclusive of the issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed as modified.

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Edward W. Stuebing, Member

We concur:

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Martin Ritvo, Member

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Joseph W. Goss, Member